(26,820)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 240.

E. W. BLISS COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1919.

1 Court of Claims.

No. 32,838.

E. W. BLISS COMPANY

vs.

THE UNITED STATES.

I. *History of Proceedings.*

On May 29, 1914 the claimant filed its original petition.

On April 12, 1916 the defendants filed a motion to dismiss said petition.

On November 21, 1916 the defendants' motion to dismiss was argued and submitted.

On December 4, 1916 the defendants' motion to dismiss was overruled.

On December 13, 1916 the defendants filed a motion to strike out certain paragraphs of the petition. This motion was, on January 4, 1917, ordered to the Law Calendar.

On February 23, 1917 the defendants' motion of December 13, 1913 was argued and submitted by Mr. W. C. Workman, for the defendants, and by Mr. Arthur C. Fra[illegible] for the claimant, and it was thereupon ordered that claimant file a copy of written
2 instrument under which it claims title to patents named in paragraph 5 of the petition, with leave to amend the petition.

On March 28, 1917 the claimant filed its amended petition, and Appendix A, as follows:

II. *Amended Petition and Appendix A.*

Filed March 28, 1917.

Amended Petition.

To the Honorable the Judges of the Court of Claims.

The petition of the E. W. Bliss Company respectfully shows:

1. That petitioner is a corporation duly incorporated and existing under the laws of West Virginia, having its principal office in the Borough of Brooklyn, City and State of New York.

2. The petitioner is the maker and owner of the Bliss-Leavitt torpedo, which it has made for many years for the United States Government. That defendant, in addition to such purchase of torpedoes from petitioner, has also at various times, purchased torpedoes

of Whitehead & Company, an English corporation, and has also, itself made various parts of torpedoes in the United States.

3 3. That petitioner now, is, and, at all times since the grant and assignment to it of the Letters Patents hereinafter referred to, has been the sole and exclusive owner of the invention and improvements thereof covered by said Letters Patents. That the device or structure embodying said inventions is generally known as, and hereinafter will be designated as a "superheater." That said superheater is a device whereby fuel is burned in the compressed air driving the motor by which the torpedo is propelled, so that the compressed air is heated to a high degree before its energy is utilized, and by means of which its energy is vastly increased.

4. That said superheater invention was covered by Letters Patent of the United States, No. 693,871, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, of Brooklyn, New York, the assignment, dated December 21, 1898, having been duly recorded in the United States Patent Office on January 31, 1902, in Liber D, 64, page 467, of Transfers of Patents, and by Letters Patent of the United States, No. 693,872, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, said assignment, dated January 23, 1902, having been duly recorded in the United States Patent Office January 31, 1902, in Liber D, 64, page 468, of Transfers of Patents.

5. (*a*) That certain improvements in said superheater made by William Hollis Sodeau, of Newcastle-upon-Tyne, England, were acquired by Sir W. G. Armstrong, Whitworth & Company, Ltd. (hereinafter referred to as "Armstrong Company"), of the same place, and set forth in British Specification No. 25,003 of the 17th of November, 1904, and thereafter said Armstrong Company and
4 petitioner did enter into a certain written instrument dated the 10th day of April, 1905, a true copy of which is hereunto annexed, marked "Appendix A."

(*b*) That said instrument was entered into in contemplation of an application for patent in the United States covering the same subject matter, and in due course two such applications for patent were filed and the following Letters Patent granted thereon to said Armstrong Company as the assignee of said William H. Sodeau (assignments thereof having been duly recorded in the United States Patent Office), namely:

No. 827,891, granted August 7, 1906, and
No. 828,432, granted August 14, 1906;

and that said Armstrong Company, upon the grant of said Letters Patent, notified petitioner thereof, and that said Letters Patent were for the same invention set forth in said English Specification No. 25,003 of the 17th of November, 1904.

(*c*) That said patents and each and all of the other subsequent patents hereinafter named, were and are subservient to said patents Nos. 693,871 and 693,872, and could not be used in torpedoes without employing the invention covered by said last-named patents.

(*d*) That the effect of said written instrument was to grant unto petitioner and its assigns the sole and exclusive license and authority to make, use and vend the inventions of said Letters Patent Nos. 827,891 and 828,432 for the whole period of the terms thereof, in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by petitioner, and Whitehead torpedoes sold only to the United States Government.

5 (*e*) That on the dates given below, the following Letters Patent of the United States were duly granted to said Armstrong Company as the assignee of said William H. Sodeau and of said William H. Sodeau and Edward W. Lloyd (assignments thereof having been duly recorded in the United States Patent Office), viz.:

No. 835,262, granted November 6, 1906;
No. 850,307, granted April 16, 1907;
No. 944,975, granted December 28 ,1909;
No. 964,574, granted July 19, 1910;
No. 1,008, 871, granted November 14, 1911, and
No. 1,009,024, granted November 14, 1911.

(*f*) That pursuant to the provisions of Articles 8 and 10 of said written instrument (Appendix A), said Armstrong Company did from time to time communicate to petitioner the subjects-matter contained in and claimed by the several Letters Patent recited in the foregoing sub-paragraph (*e*), and did furnish petitioner with full information, drawings and designs concerning the same; and petitioner did thereafter adopt and incorporate in its Bliss-Leavitt torpedoes constructions of superheaters and appurtenances thereof (known as "outside superheaters" or "Armstrong superheaters") embodying wholly or in part the subjects-matter of said United States patents; and that petitioner upon so doing did notify said Armstrong Company to that effect and that royalties would be payable under said written instrument for such superheaters as sold to the United States; and that subsequently upon making sales of said torpedoes containing said outside superheaters to the United States, petitioner did from time to time (as provided in Articles 4, 5 and 6 of Appendix A) account and pay to said Armstrong Company the royalties
6 named in Article 4 of the said instrument for each and all of the torpedoes sold containing such outside superheaters; and said Armstrong Company did receive and accept and receipt for all of said royalties so paid.

(*g*) That it has been uniformly recognized and understood by and between said Armstrong Company and petitioner that the several United States Letters Patent named in this paragraph 5 are within and covered by said written instrument (Appendix A) as fully and

effectively as if in terms recited therein; and that as respects said Letters Patent petitioner was entitled to and has enjoyed all the exclusive rights set forth in said written instrument; and that petitioner's rights under said written instrument concerning said patented superheaters for torpedoes have been exclusive of all others in so far as concerns Bliss-Leavitt and Whitehead torpedoes within and throughout the United States and for the use of the United States Government; and that the only known or existing torpedoes are said Whitehead and Bliss-Leavitt torpedoes, or others substantially like them, and that no other torpedoes are adopted, purchased, made, or used, by the United States or any other government; that said torpedoes are propelled by stored compressed air or other gas, and it is only to torpedoes so propelled that superheaters are applicable; and that no other torpedoes containing superheaters are known in the art or sold to, or used by, the United States Government; and that the facts herein stated have been true at all times from the date of said instrument (Appendix A) down to the present; and that accordingly, petitioner has solely and exclusively been entitled to, and had and enjoyed, as respects all torpedoes, the protection resulting from the grant of said several Letters Patent and each of them.

7 (h) That from the date of said written instrument (Appendix A), and during the entire period referred to in the present petition and up to the present time, all the terms, conditions and covenants of said written instrument have been fully executed, observed and lived up to, and said instrument has at all times been and is now in full force and effect.

6. That petitioner now is the owner as aforesaid of all the rights and privileges granted and secured or intended to be granted and secured in and by said Letters Patent, and has been such owner since the granting of said respective patents.

7. That the said Frank M. Leavitt was the true, original and first inventor of the said invention and improvements thereon patented in said Letters Patent, Nos. 693,871 and 693,872, that the same were not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof or more than two years prior to his application for said Letters Patent, Nos. 693,871 and 693,872 or either of them, and had not been in public use or on sale in this country for more than two years prior to his said respective applications, and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said Frank M. Leavitt or his legal representatives or assigns more than seven months prior to the filing of said application for said patent No. 693,871, or said application for said patent No. 693,872.

8 8. That the said William H. Sodeau was the true, original and first inventor of the improvements on said superheater

patented in said Letters Patent, Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871, and 1,009,024; that the same were not known or used by others in this country before his respective invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before his respective invention or discovery thereof or more than two years prior to his respective applications for said Letters Patents Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871, and 1,009,024, and which had not been in public use or on sale in this country for more than two years prior to his said respective applications and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said William H. Sodeau or his legal representatives or assigns more than twelve months prior to the respective filing of the applications for said patents Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871, and 1,009,024.

8-*a*. That the said William H. Sodeau and Edward W. Lloyd were the true original and joint inventors of the improvements on said superheater patented in said Letters Patent No. 850,307, that the same was not known or used by others in this country before their said invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before their said invention or discovery thereof, or more than two years prior to their application for said Letters Patent No. 850,307, and which have not been in public use or on sale in this country for more than two years prior to their said application and which had not been
9 abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said William H. Sodeau and Edward W. Lloyd, or their legal representatives or assigns, more than twelve months prior to the filing of the application for said patent No. 850,307.

9. That on or about October 18, 1906, the defendant through its Bureau of Ordnance of the Navy Department, in written communications, bearing said date, requested a list of petitioner's patents covering the Bliss-Leavitt torpedo and the amount of royalty which petitioner would charge defendant for the use thereof. That on or about November 24, 1906, petitioner furnished such list in writing which included said superheater patents. That subsequently, and on or about June 14, 1907, defendant by telegraph, requested permission of petitioner to purchase a limited number of torpedoes from Whitehead & Company, an English corporation, containing said superheater inventions. That petitioner on same day replied by telegraph that it desired to render every assistance to the government on a proper business basis. That thereupon, and on or about June 17, 1907, the officers of petitioner conferred with Admiral Mason, Chief of the Bureau of Ordnance, at Washington, and it was agreed between them that the government might purchase not more than 100 torpedoes from Whitehead & Company, the amount of the royalty for the use therein of said superheater inventions to be later settled and

agreed upon by the defendant and petitioner. That subsequently defendant bought of Whitehead & Company, pursuant to said agreement 50 torpedoes containing said superheater inventions,
10 which were, as petitioner is informed and believes, brought into the territory of the United States subsequent to June 1, 1908. That on or about November 9, 1907, defendant, through its said Bureau of Ordnance, by letter bearing said date, stated, "The Bureau desires to take the subject of royalties under consideration for final settlement and requests that the company will submit proposals covering the following points: * * * (*b*) Royalty to be paid by the government for the manufacture of gyro and superheater for installation in Whitehead or other type of torpedo. (*c*) Price to be paid for superheaters and gyros manufactured by the E. W. Bliss Company and installed by the government in Whitehead or other type of torpedoes." That thereupon petitioner replied by letter dated November 25, 1907, "Referring to your letter of November 9th, in regard to royalties on Bliss-Leavitt torpedo, and in confirmation of verbal proposition made by the officers of this company to you at Sag Harbor a few days ago, beg to state that we consider the following royalties and prices to be fair. * * * (3) Royalty to be paid by the government for the manufacture of superheaters for installation in Whitehead or other type of torpedo, five hundred dollars ($500.00). (4) Price to be paid for superheaters manufactured by E. W. Bliss Company and installed by the government in Whitehead or other type of torpedoes, six hundred fifty dollars ($650.00)." That defendant, through its said Bureau, by letter dated November 29, 1907, acknowledged receipt of said letter of November 25, 1907, and stated that the matter would be laid before the Torpedo Board at its meeting on December 3, 1907, and invited petitioner to attend.

That petitioner, by its executive officers, attended said meet-
11 ing and explained the reasonableness of said royalty to the members of the Torpedo Board. That thereafter, and on or about June 4, 1908, by contract bearing said date, the defendant agreed to pay petitioner six hundred fifty dollars ($650.00) each, for twenty superheaters containing said patented inventions and improvements, or some of them. That said contract was duly performed and the price paid. That defendant, on or about December 12, 1910, by letter bearing said date, referred to the superheater royalty specified in petitioner's letter of November 25, 1907, and requested a reduction thereof. That petitioner replied by letters dated December 20, 1910, declining to reduce the amount of said royalty. That thereafter, and on or about April 18, 1911, by contract bearing said date, petitioner agreed to furnish 75 superheaters containing said patented inventions and improvements or some of them to the government at six hundred fifty dollars ($650.00) each. That said contract was duly performed and the contract price paid. That defendant, by letter dated April 27, 1911, requested additional superheaters to replace ones on which the royalty had already been paid, and requested that for this reason, the price for these new superheaters be reduced. That accordingly, on or about June 16, 1911, by contract bearing

said date, petitioner agreed to supply 100 superheaters containing said patented inventions and improvements or some of them at two hundred dollars ($200.00) each. That said contract was duly performed and the purchase price paid. That thereafter, and on or about March 13, 1912, by letter bearing said date, defendant repeated its request of December 20, 1910, for a reduction of the five hundred dollars ($500.00) royalty for superheaters. That petitioner
12 by letter dated March 19, 1912, declined to grant any reduction and no reduction has ever been granted, and petitioner has never consented to the use of said patented inventions or said patented improvements thereon or any of them by defendant without payment of said royalty of five hundred dollars ($500.00) each.

10. That in addition to the 50 torpedoes purchased by defendant from Whitehead & Company, as set forth in the preceding paragraph of this petition, defendant has purchased from the same company other torpedoes containing some or all of said patented superheater inventions and improvements, namely, 130 torpedoes on or about July 7, 1908; 180 torpedoes on or about March 29, 1911; and 50 torpedoes on or about October 25, 1911. That in addition, defendant has made since April 15, 1913, or is engaged in making, 100 superheaters in the United States which contain said patented superheater and said patented improvements thereon or some of them.

10*a*. That subsequently to April 10, 1905, and after the invention and development and practical introduction of said inside or Armstrong superheater, and prior to June 14, 1907, as petitioner is informed and believes, said Armstrong Company licensed said Whitehead & Company to use and exercise the inventions set forth in the patents recited in paragraph 5 of this petition under the corresponding Letters Patent of Great Britain for said inventions respectively, said license having been expressly subject to the rights of petitioner under said instrument of April 10, 1905 (Appendix A); and that subsequent to such license to said Whitehead & Company, and prior to June 14, 1907, and immediately preceding said latter date,
13 said Whitehead & Company (being then in privity with said Armstrong Company concerning the premises) informed the Bureau of Ordnance of the United States Navy Department that they (Whitehead & Company) were not at liberty to sell Whitehead torpedoes to the United States containing the so-called Armstrong superheater without the express permissiion of petitioner, and that such action by Whitehead & Company was taken because they knew that under said instrument (Appendix A) petitioner alone had the right to sell such superheaters to the United States; and that the Chief of the Bureau of Ordnance so informed petitioner on or about June 14, 1907, when (as stated in paragraph 9 of this petition) the defendant requested petitioner's permission to purchase torpedoes from said Whitehead & Company containing said superheater inventions, and that defendant requested such permission from petitioner because de-

fendant well knew of such instrument (Appendix A) and that under its provisions petitioner alone had the right to sell such Armstrong superheaters to the United States.

11. That the fair and reasonable royalty for each of said superheaters is $500.00, which is also the stipulated and agreed royalty as above stated.

12. That petitioner on or about May 2, 1913, and at various other times, has demanded from defendant payment of said royalty of $500 for each of the 510 superheaters referred to in the preceding paragraphs of this petition, but defendant has wholly failed and neglected to pay any part thereof, and, by reason of the premises, the defendant is justly indebted to your petitioner in the sum of two hundred and fifty-five thousand dollars ($255,000), which sum is still due and unpaid.

14 13. That the petitioner is the sole owner of the claim set forth in this petition, no assignment or transfer of the said claim or of any interest therein having ever been made, and that petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and off-sets.

14. That no action upon your petitioner's claim has been had by or before Congress or any executive department of the Government, except that petitioner brought the subject of its claim to compensation for the use of said invention by the United States to the attention of the Secretary of the Navy by letter of May 2, 1913, and that thereafter your petitioner was informed by the Assistant Secretary of the Navy that the necessary proceedings for the consideration and adjustment of said claim should be instituted in this Honorable Court.

15. That petitioner is as aforesaid a domestic corporation organized under the laws of West Virginia, and that petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; that neither petitioner nor any assignee of petitioner's has at any time brought or has now pending in any court any suit or process against any other person, firm or corporation acting or professing to act mediately or immediately under the authority of the United States for or in respect of the claim herein presented.

16. That the facts stated in this petition are true.

Whereupon your petitioner asks judgment in its favor against the United States for the said sum of $255,000.00.

15 The petitioner's address is Brooklyn, New York. The address of its attorneys, Bacon & Milans, is 908 G Street, N. W., Washington, D. C.

(Signed) E. W. BLISS COMPANY,
By F. C. B. PAGE,
Vice-President.

L. S. BACON,
Attorney for Claimant.
FRANK H. PLATT,
ARTHUR C. FRASER,
Of Counsel.

EASTERN DISTRICT OF NEW YORK,
City of New York, Borough of Brooklyn, ss:

F. C. B. Page, being duly sworn according to law, says that he is the Vice-President of the E. W. Bliss Company, the petitioner named in the foregoing amended petition; that he has read the said petition and knows the contents thereof, and that the facts stated in the said petition are true to the best of his knowledge, information and belief.

(Signed) F. C. B. PAGE.

Sworn to and subscribed to before me this 27" day of March, 1917,
[NOTARY'S SEAL.] MOSES ARONSON,
Notary Public, #83, Kings Co., N. Y.

16 APPENDIX A.

Agreement, entered into this 10th day of April, 1905, between Sir W. G. Armstrong, Whitworth & Company, Ltd., Elswick Works, Newcastle upon Tyne, hereinafter referred to as the Armstrong Co., of the one part, and the E. W. Bliss Company, of the Borough of Brooklyn, City and State of New York, United States of America, hereinafter referred to as the Bliss Co., of the other part, witnesseth:

1. Whereas the Armstrong Co. are the sole owners of an invention provisionally protected in England by a specification No. 25003 deposited on the 17th day of November, 1904, for "Improvements in or relating to a method and means for increasing the work obtainable from a charge of compressed air more particularly applicable to the propulsion of torpedoes and the like"; and whereas the Armstrong Co. proposes to apply for a patent in the United States of America covering the same subject matter and desires to grant to the Bliss Co. an exclusive license to use the said inventions in connection with the Bliss-Leavitt torpedo manufactured by the Bliss Co. upon the terms and for the purposes hereinafter expressed, and the Bliss Co. desires to acquire such license,

It is agreed as follows:

2. The Armstrong Co. hereby grants unto the Bliss Co. and their assigns the sole and exclusive license and authority to use and exercise the said inventions under the said Letters Patent for the whole period of the term to be granted by the said Letters Patent and any
17 extension of the said term in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by the Bliss Co., and Whitehead torpedoes sold only to the United States Government.

3. All fees, costs and expense of and attending the completing, obtaining, maintenance and protection of any patent and similar rights obtained or to be obtained under these Presents shall be paid and borne by the Armstrong Co.

4. The Bliss Co. shall pay to the Armstrong Co. the sum of Twenty-Five (25) Dollars as royalty for each torpedo fitted with apparatus manufactured under the said patents, or any extension thereof.

5. The royalties shall be paid on the first days of January and July in every year.

6. The Bliss Co. shall keep proper accounts of all apparatus made by them under this license, and will at the end of every half year furnish to the Armstrong Co. full particulars thereof and of the royalty payable therefor; and will, if required, verify same by statutory declaration; and will also, if and when required, permit the Armstrong Co. to inspect the apparatus in course of manufacture.

7. If default be made in payment of any royalty when the same becomes due, or if there shall be any breach of this agreement, and such default or breach shall continue for three months after notice in writing from the Armstrong Co. requiring default or breach to be made good, then, and in either of such cases, the Armstrong
18 Co. may, by notice in writing given to the Bliss Co., or left at their registered office, declare this license to be void, and the same shall be void accordingly.

8. The Armstrong Co. shall from time to time, upon demand, give to the Bliss Co. free of charge full information, drawings and designs showing the latest method of applying their said patented invention or any improvements therein to anything allowed to be done under or in pursuance of this license.

9. The Armstrong Co. shall not at any time during the continuance of this license use or exercise the said invention, or any such future improvement or improvements as hereinafter mentioned; or grant any license to any other person or persons whomsoever to use or exercise the same, or any such improvement or improvements, for the purpose of propelling Bliss-Leavitt torpedoes, or Whitehead tor-

pedoes, so far as such Whitehead torpedoes may be intended for sale to the United States Government.

10. If during the continuance of this license the Armstrong Co. shall make or discover any improvement or addition to the said invention or the use of the same, or which can or may be employed for the same purpose as the said invention, or shall become owners of any such improvement or additio nor substitute, then, and in every such case, and whether such improvement or addition should be the subject of Letters Patent or not, they will forthwith communicate the same to the Bliss Co., who shall be entitled to use and practice such improvement or addition during the continuance of the
19 license hereby granted without paying any further royalty or consideration in respect thereof.

11. In case the said Letters Patent, or any extension or renewal thereof, shall be infringed so far as regards the license to use the same as hereby granted, the Armstrong Co. shall forthwith, after notice of such infringement, at their own cost, take all necessary proceedings for effectually protecting and defending the same; and in default of their so doing the Bliss Co. shall be at full liberty, by notice in writing given or left at their usual or last known place of business, to determine this agreement.

12. If the Armstrong Co. shall in their application for the United States Patent describe the said invention as an improvement in the method and apparatus specified in the United States Patents Nos. 693,871 and 693,872, both dated the 25th of February, 1902, and granted to Frank M. Leavitt, then the Bliss Co. shall not either directly or indirectly oppose or in any way hinder the granting of such Letters Patent to the Armstrong Co.

13. If any difficulty or dispute shall arise between the Armstrong Co. and the Bliss Co. touching or concerning the construction of these Presents, or any clause or matter herein contained, or the rights, duties or liabilities of either party hereunto, then, and in every such case, the dispute or difference shall be referred to a single arbitrator to be agreed upon between them; and in case of the neglect, refusal or inability of the said parties to agree upon a single arbitrator, then to an arbitrator to be appointed by the President for the time being of the Institute of Civil Engineers.

20 In witness whereof, the parties hereto have hereunto caused their respective common seals and signatures to be affixed the day and year first above written.

E. W. BLISS COMPANY.
W. A. PORTER,
Vice-President.

Attest:

H. C. SEAMAN,
[SEAL.] *Secretary.*
A. M. W.
S. W. SALHUE,
[SEAL.] *Director.*
A. H. COCHRANE,
Secretary.

21 III. *History of Further Proceedings.*

On April 7, 1917 the defendants filed a demurrer and motion to strike out certain paragraphs of the amended petition.

On May 23, 1917 the defendants' motion of April 7, 1917 was argued and submitted by Mr. H. C. Workman, for the defendants, and by Mr. Arthur C. Fraser, for the claimant.

IV. *Order of Court on Defendants' Demurrer and Motion of April 7, 1917.*

Entered May 28, 1917.

It is ordered by the court that this case be and the same is hereby remanded to the Law Calendar. (See Memorandum.)

Memorandum.

The motion herein by the defendants and their demurrer appear to be addressed to parts of the petition, and their brief makes it appear as though there were a demurrer to the whole petition as amended. If it is the purpose of the Government to demur to the petition as amended the case is remanded to enable them to make their position in that regard clear in their pleading.

By THE COURT.

22 V. *Substituted Demurrer and Motion* (1) *to Dismiss Said Amended Petition, or* (2) *to Strike Out Certain Paragraphs.*

Filed June 2, 1917.

Demurrer and Motion.

Now comes defendant, by its Attorney General, and demurs to the amended petition filed April 3, 1917, and for grounds of demurrer says:

1. That the facts and things alleged in said petition do not make or constitute any cause of action against defendant nor any cause of action of which this court has jurisdiction.

As a separate ground of demurrer defendant further says:

2. That the paragraphs of said petition numbered 5 (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), 6, 8, 8-*a*, and 10-*a*, and the written instrument, "Appendix A," specified in said paragraphs, do not show any title or ownership in plaintiff in or to the eight letters patent, or any of them, specified in said paragraphs, nor any such title or ownership therein as can give plaintiff any right to sue for or recover from defendant any royalties, damages, or compensation for defendant's alleged use of the inventions of said letters patent or any of them.

23 As a separate ground of demurrer defendant further says:

3. That paragraphs (*b*), (*c*), (*d*), (*e*), (*f*), and (*g*) of said petition are wholly conclusions of law in that it requires adjudication of the court and judicial interpretation of the respective letters patent to determine: (1) Whether or not the two letters patent specified in paragraph (*b*) are, as alleged, for the same invention as set forth in English Specification No. 25003, of November 17, 1907; and also (2) whether or not the two patents specified in paragraph (*b*) "and each and all of the other subsequent patents hereinafter named were or are subservient to patents Nos. 693871 and 693872," etc., as alleged in paragraph (*c*) and (3) whether or not "the several United States Letters Patent named in this paragraph 5," including the six named in paragraph (-) "are within and covered by said written instrument (Appendix A)," etc., as alleged in paragraph (*g*).

As a separate ground of demurrer defendant says:

4. That paragraph 2 of said petition is irrelevant and immaterial to any of the matters and things alleged or set forth in the petition as supporting any right in plaintiff or any complaint against defendant.

Wherefore defendant moves the court: (1) To dismiss said petition, or, (2) to strike out of said petition paragraphs numbered 2,

5 (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), (6), 8, 8*a*, and 10*a*.

24 And defendant further moves the court for an order substituting the foregoing demurrer and motion in the place of defendant's demurrer and motion to strike out filed April 7, 1917, the briefs heretofore filed by defendant to stand as the briefs and argument upon this demurrer and motion; and for such other and further action as the court may deem just and proper in the premises.

HUSTON THOMPSON,
Assistant Attorney General.
H. C. WORKMAN,
Attorney.

VI. *Argument and Submission of Above Motion.*

On October 29, 1917 the defendants' demurrer to, and motion to strike out certain paragraphs of amended petition was argued and submitted by Mr. H. C. Workman, for the defendants, counsel for claimant not being present.

25 VII. *Opinion of the Court by Campbell, Ch. J., in Which all the Judges Concur.*

Entered December 3, 1917.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The plaintiff, E. W. Bliss Company, brought its action against the United States to recover several sums aggregating $255,000, claimed to be due as "royalties" upon certain patented inventions or compensation for their use by the United States. The defendants have demurred to the amended petition, and have moved to strike separate portions of the same.

The objections presented are (1) that the amended petition does not show a contract between plaintiff and defendant, (2) that it seeks a recovery of damages sounding in tort, or (3) that the case is one of infringement and plaintiff is a mere licensee of the described patents.

Prior to the act of June 25, 1910, 36 Stat., 851, the Court of Claims had jurisdiction in cases involving patents where the claim was based upon express or implied contract and had no jurisdiction in cases claiming compensation for infringement. That act materially enlarged the court's jurisdiction where the alleged infringement was subsequent to the passage of the act. Certain limitations appear in the act which are not material in the present case.

It is important to observe the distinction between actions for the recovery of royalties or sums claimed to be due for the use by the United States under contract, express or implied, and actions for infringement. There are defenses which are open to the Government when charged with infringement which can not be urged when the

action is upon express contract. In the former class the validity of the patent, or whether the patented device exhibits novelty, may be a vital question, whereas in an action upon an express contract no such question is involved.

The court's jurisdiction in matters of contract is defined by section 145 of the Judicial Code. It has no jurisdiction of damages in cases "sounding in tort." It has been definitely settled that the statute inhibits jurisdiction in the court of that class, sometimes called quasi contracts, which involve tort or a breach of a mere duty
26 growing out of the relation of the parties as distinguished from a breach of contract made between them, and which in some jurisdictions are enforceable in actions ex contractu. Where the claim arises out of tort it is not permissible for the plaintiff to waive the tort and sue in assumpsit in this court. These questions have been settled by decisions of the Supreme Court.

In Russell v. United States, 182 U. S., 516, an action had been brought upon an alleged implied contract to pay for the use of a patented invention, and it was held under the facts found that no contract could be implied, and that if petitioners had suffered any injury it had been through the infringement of their patent, not by a breach of contract. "For the redress of an infringement the Court of Claims has no jurisdiction." That case was decided prior to the said act of June 25, 1910. It was said in Russell's case:

"This court has held that under the act of March 3, 1887 (brought forward as section 145 of the Judicial Code), defining claims of which the Court of Claims had jurisdiction, the court had no jurisdiction of demands against the United States founded on torts. Schillinger v. United States, 155 U. S., 163; United States v. Berdan Fire-Arms Co., 156 U. S., 552. In other words, to give the Court of Claims jurisdiction, the demand sued on must be founded on a convention between the parties—'a coming together of minds.'" A reason for the distinction between the rights of the Government and of an individual defendant when sued upon an alleged implied contract is stated to be that "it is the prerogative of a sovereign not to be sued at all without its consent or upon such causes of action as it chooses. It has not chosen to be sued in actions sounding in tort. This court has declared as we have seen." Op., p. 533.

It was said in Harley's case, 198 U. S., 229, 234:

"We held in Russell v. United States, 182 U. S., 516, 530, that in order to give the Court of Claims jurisdiction under the act of March 3, 1887, 24 Stat., 505, ch. 359, defining claims of which the Court of Claims had jurisdiction, the demand sued on must be founded on 'a convention between the parties' — 'a coming together of minds.' And we excluded as not meeting this condition those contracts or obligations that the law is said to imply from a tort. Schillinger v. United States, 155 U. S., 163; United States v. Berdan Fire-Arms Mfg. Co., 156 U. S., 552."

To the same effect is Juragua Iron Co. v. United States, 212 U. S., 297, 309. The cases are reviewed in Gigby's case, 188 U. S., 400, where the petitioner sought to fix a liability upon the Government for personal injuries sustained by the petitioner in an elevator owned by the Government and operated by one of its employees. The theory advanced to sustain the action was that of an implied contract. The court held that the action was necessarily one sounding in tort, and that there was no contract, express or implied, growing out of the facts which could be made the basis for jurisdiction under the Tucker Act of March 3, 1887. It was said by the court, p. 409:

"A party may in some cases waive a tort; that is, he may forbear to sue in tort and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that 'a right of action in contract can not be created by waiving a tort, and the duty to pay damages for a tort does
27 not imply a promise to pay them upon which assumpsit can be maintained.' Cooper v. Cooper, 147 Mass., 370, 373."

The above citations make it clear that it is not every use by the Government of a patented invention that gives rise to an action upon an implied contract to pay for such use. It is only when the facts alleged establish an express or implied contract to pay for such use that the petition is cognizable in this court, aside from the act of 1910. Farnham case, 240 U. S., 537, 540.

As above suggested, the act of June 25, 1910, 36 Stat., 851, confers jurisdiction on this court in certain cases of infringement. It may be that the court's jurisdiction has been further enlarged by later acts of Congress which are not material in this suit.

The purpose of the act of 1910 was to provide a forum where the Government could be sued for infringement by parties bringing themselves within the provisions of the act, "and the nature and character of the defenses which the statute prescribes may be made by the United States to such an action when brought." Crozier v. Krupp, 224 U. S., 290, 305. The act prescribes that the Government when sued "may avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for infringement as set forth in Title 60 of the Revised Statutes or otherwise." The act by no means obliterates the distinction between actions based upon contract, express or implied, and actions for infringement. It may accentuate the difference by a recognition thereof inherent in the purpose of the act to afford a measure of relief to owners of patented inventions which they could not obtain prior to the passage of the said act. Crozier v. Krupp, supra.

The act of June 25, 1910, provides that whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States "without license of the owner thereof or lawful right to use the same," such "owner" may recover reasonable compensation for such use by suit in the Court of Claims with certain limitations, not material here, contained in the act. It is

well settled that a mere licensee can not sue for an infringement of a patent.

In Waterman v. Mackenzie, 138 U. S., 252, it is said:

"Every patent issued under the laws of the United States for an invention or discovery contains 'a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the Territories thereof.' Rev. Stat. §4884. The monopoly thus granted is one entire thing, and can not be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant, and convey, either, 1st, the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or, 2d, an undivided part or share of that exclusive right; or, 3d, the exclusive right under the patent within and throughout a specified part of the United States. Rev. Stat., §4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone.
28 Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. Stat., §4919; Gayler v. Wilder, 10 How., 477, 494, 495; Moore v. Marsh, 7 Wall., 515. In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer and can not sue himself. Any rights of the licensee must be enforced through or in the name of the owner of the patent and perhaps, if necessary, to protect the rights of all parties joining the licensee with him as a plaintiff. Rev. Stat., §4921. Littlefield v. Perry, 21 Wall., 205, 223; Paper Bag cases, 105 U. S., 766, 771; Birdsell v. Shaliol, 112 U. S., 485-487. And see Renard v. Levinstein, 2 Hem. & Mil., 628."

The language of section 4919 of the Revised Statutes authorizes suit for infringement "in the name of the party interested, either as patentee, assignee, or grantee." The act of 1910 authorizes suit by the "owner." It becomes necessary, therefore, to determine whether the plaintiff in this suit had such title as "owner" as would authorize a suit for infringement against the United States.

The several transactions alleged in the petition upon which the liability of the Government is rested may be grouped into three classes: (1) An alleged purchase by the Government of 50 Whitehead torpedoes containing the "superheaters" covered by the Armstrong patents, (2) the purchase by the Government at three different times in 1908 and 1911 from Whitehead & Company of Whitehead torpedoes containing the said superheaters to the number of 360, and

(3) the making by the Government of an additional 100 of said superheaters. We speak of the allegation as referring to the "superheaters" for brevity, and do not overlook the fact that the averment is that the Government purchased torpedoes, or has made or is making superheaters which contain the patented superheaters and patented improvements thereon or "some of them." In the view we take of the case, it is not necessary that we examine the sufficiency of the allegations in their designation of what was purchased or made by the Government. We shall assume that the plaintiff intends to claim that the Government is liable in contract or for infringement because of its purchase or manufacture or use of the device covered by the Armstrong patents or the improvements thereon, and for brevity we call the device "superheaters."

By the exhibit to the amended petition, "Appendix A," the plaintiff shows what his interest is. The averments of the petition must be read in the light of said exhibit which purports to be an agreement made on the 10th day of April, 1905, between the Armstrong Company and the plaintiff. It recites that the Armstrong Company owns an invention under an English patent for "improvements in or relating to the method and means for increasing the work obtainable from a charge of compressed air more particularly applicable to the propulsion of torpedoes and the like"; that the Armstrong Company was proposing to apply for a patent in the United States covering the same subject matter "and desires to grant to the Bliss Company an exclusive license to use the said invention in connection with the Bliss-Leavitt torpedo manufactured by the Bliss Company
29 upon the terms and for the purposes hereinafter expressed, and the Bliss Company desires to acquire such license." The agreement proceeds to grant to the Bliss Company and their assigns "the sole and exclusive license and authority to use and exercise the said inventions under the said letters patent for the whole period of the term to be granted by the said letters patent, and any extension of the said term in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by the Bliss Company "and Whitehead torpedoes sold only to the United States Government."

Whether the transfer mentioned is an assignment or a license does not depend upon the name by which it is called, but upon the legal effect of the contract. Waterman v. Mackenzie, supra. The petition shows that the E. W. Bliss Company was the maker and owner of the Bliss-Leavitt torpedo and it is apparent that an important element in the consideration to the Armstrong Company for granting said rights was the concession that the Bliss Company would not "either directly or indirectly oppose or in any way hinder the granting" of letters patent to the Armstrong Company in the event the Armstrong Company, in their application for a United States patent, should describe the invention as an improvement in the method and apparatus specified in United States patents theretofore granted to Frank M. Leavitt. A further consideration was that the Bliss Company would pay $25.00 as royalty for each torpedo fitted with the

apparatus manufactured under said patents. There is a provision in paragraph nine of the agreement that the Armstrong Company "shall not at any time during the continuance of this license use or exercise the said invention * * * or grant any license to any other person or persons whomsoever to use or exercise the same * * * for the purpose of propelling Bliss-Leavitt torpedoes or Whitehead torpedoes so far as such Whitehead torpedoes may be intended for sale to the United States Government."

It appears from the amended petition that Whitehead & Company is a foreign corporation, from whom the defendant has at various times purchased torpedoes. It does not appear that Armstrong & Company had any interest in Whitehead & Company or in torpedoes made by that company. It is averred that the defendant purchased from Whitehead & Company 130 torpedoes on or about June 7, 1908, 180 torpedoes on or about March 29, 1911, and 50 torpedoes on or about October 25, 1911, all of which torpedoes, it is averred, contained the "patent superheater inventions and improvements." These are referred to in the amended petition and will be by us referred to as superheaters. It is also averred that in addition to said purchases from Whitehead & Company the defendant has made since April 15, 1913, "100 superheaters in the United States" which contain said patented superheater and certain patented improvements thereon, "or some of them," mentioned in the amended petition.

It is further averred that the Armstrong Company licensed Whitehead & Company "to use and exercise the said inventions" under the English patents, "said license having been expressly subject to the rights of petitioner under" said Exhibit "A," and that Whitehead & Company informed the Bureau of Ordnance of the United States Navy that they were not at liberty to sell Whitehead torpedoes to the United States containing the so-called Armstrong superheater without the express permission of Bliss & Company.

The amended petition avers that the plaintiff "now is the owner as aforesaid of all the rights and privileges granted, or intended to be granted, and secured in and by said letters patent, and has been such owner since the granting of said respective patents," referring thereby to said superheater patents and to certain other patents mentioned in the amended petition and designated as the Sodeau inventions. The averment of ownership must be treated as a conclusion of the pleader inasmuch as the question of ownership must be determined from the written agreement attached to the petition. While the agreement grants in terms a license "to use and exercise" the inventions, it is averred in the petition that the effect of the written instrument was to grant the sole and exclusive license and authority "to make, use, and vend" the said inventions, and it was explained in argument that "use and exercise" is an expression in the English patent conveyancing that has the same meaning as "make, use, and vend" have in American patent law.

Except for the purposes of the demurrer and motion in this case we express no opinion as to whether the construction of said words given them by plaintiff is correct when the rights of third parties are

involved. London Assurance Co. v. Companhia, etc., 167 U. S., 149, 160; Scudder v. Union National Bank, 91 U. S., 406; Liverpool Co. v. Phœnix Insurance Co., 129 U. S., 397, 446, 453. But assuming that the plaintiff's construction is correct, the question before us is whether the right granted by the Armstrong Company to the Bliss Company of the sole and exclusive license and authority to make, use, and vend superheaters and other improvements in connection with Whitehead torpedoes "sold only to the United States Government" amounts to such a transfer of ownership as will sustain an action by the Bliss Company under the act of 1910.

For the purposes of this suit it must be conceded that the Whitehead torpedoes were not made in the United States. It is averred that those which were purchased were acquired from a foreign corporation, namely, Whitehead & Company. It is apparent that the whole patent was not assigned, and that an undivided part or share was not assigned, and referring to the rules announced in Waterman v. Mackenzie, supra, does the grant amount to an exclusive right under the patent within and throughout a specified part of the United States? We think not. While the right to use the superheaters in the Bliss-Leavitt torpedoes, the patents to which belonged to the Bliss Company, is granted, the grant, so far as any other torpedoes are concerned, is limited to Whitehead torpedoes "sold only to the United States Government." The right of the Armstrong Company to sell its superheaters to any other company, foreign or domestic, which should manufacture torpedoes, except Whitehead & Company, is by the agreement manifestly reserved to the Armstrong Company. Any person having the right to make torpedoes could purchase superheaters from Armstrong & Company for use therein and could sell them anywhere to any person or government and to the United States Government, except only by the terms of the agreement the Whitehead torpedoes and the Bliss-Leavitt torpedoes. There is nothing in the agreement which restricts the manufacture in the United States of the superheaters by the Armstrong Company
31 or its assignees. That company can make them or authorize them to be made at one or more factories or plants in the United States and can sell them or authorize them to be sold in the United States to any other Government in the world than the United States Government, except in connection with Bliss-Leavitt or Whitehead torpedoes. Any party having the lawful right to make torpedoes can be authorized by the Armstrong Company to make, use, or vend the superheaters in the United States, and to dispose of the same in connection with other torpedoes than the Bliss-Leavitt or Whitehead to any person or Government. The sole limitation upon the right of the Armstrong Company in said regard is that it will not authorize any other party than plaintiff to make, use, and vend the superheaters in connection with Whitehead torpedoes sold to the United States Government. The stipulation in the contract is analogous to a covenant not to sue the Bliss Company for infringement if it make, use, and vend the superheaters in connection with its own torpedo or in connection with the Whitehead torpedo when

the latter is sold only to the United States Government. There is no territorial limitation upon the making of torpedoes or the making or using or vending of superheaters.

While the patentee may assign his exclusive right within and throughout a specified part of the United States, and upon such an assignment the assignee may sue in his own name for an infringement of his rights, yet in order to enable him to sue the assignment must undoubtedly convey to him the entire and unqualified monopoly which the patentee held in the territory specified, excluding the patentee himself as well as others. Any assignment short of this is a mere license. Gaylor v. Wilder, 10 How. 477, 494. The grant to Bliss & Company was a mere license. This conclusion is fortified by the provision in the agreement that in case the letters patent "shall be infringed so far as regards the license to use the same as hereby granted" the Armstrong Company would take all necessary proceedings for protecting and defending the same, and in default in their doing so the Bliss Company could determine the agreement. A further provision is that the Bliss Company will pay royalties of $25 to the Armstrong Company. The instrument, therefore, contemplated a license and not an undivided part or share in an exclusive right nor an exclusive right within a specified part of the United States. Waterman v. Mackenzie, 138 U. S., 252; Walker on Patents, 296; Gamewell v. Brooklyn, 14 Fed., 225; Jaros v. Fleece, 60 Fed., 623.

It follows that being a mere licensee the plaintiff can not sue for infringement, and it is manifest that the claim on account of the manufacture by the United States of 100 superheaters "which contain said patented superheater and said patented improvements or some of them" is a claim for infringement.

The claim for the 360 torpedoes "containing some or all of said superheater inventions and improvements" is not based upon contract, express or implied. The allegations of the amended petition fall far short of showing any contract between the plaintiff and the United States with reference to them. It is specifically alleged in the ninth paragraph that "petitioner has never consented to the use of the said patented inventions or said patented improvements thereon, or any of them, by defendants without payment of
32 said royalty of $500." If that averment be confined to the 50 Whitehead torpedoes mentioned in said paragraph, it is yet plain that the plaintiff fails to show that any contract was made or can be implied with reference to said 360 torpedoes or superheaters. It is not averred that defendants purchased them with plaintiff's consent or permission. The exact contrary is to be inferred. The defendants dealt with Whitehead & Co., not in recognition of any rights of the plaintiff but in antagonism to and disregard of them. "There was no point in the whole transaction, from its commencement to its close, where the minds of the parties met or where there was anything in the semblance of an agreement." Schillinger case, 155 U. S., 163, 170. "And the use of the device can not give a right independent of the understanding under which it was used."

Harley case, 198 U. S., 229, 234. A claim for compensation for an authorized use is not a claim for an infringement. The two things are totally distinct. Russell case, 182 U. S., 516, 531. Where the facts alleged show an unauthorized use and a disregard of plaintiff's claims there may be an infringement, but no contract can be implied therefrom. Any right which the plaintiff had was such as its contract with the owner of the patents gave it, and that, as we have seen, was a mere license. No right in the patents themselves passed thereby. The plaintiff was not the "owner" of the patents in the sense that that term is used in the act of 1910. The Government therefore did not use any patent belonging to plaintiff. It refused to acknowledge a right in the plaintiff to fix a price at which the torpedoes and superheaters combined could be purchased, and proceeded to buy them from a party who had the right to sell the torpedoes, and who, according to the averments of the petition, also had the right to sell the superheaters to other governments than the United States. If there was any element of tort in the transaction, that fact can not be made the basis of an action ex contractu. The plaintiff being a mere licensee and not the owner of the patents, can not sue for infringement or maintain its action on account of the said 360 superheaters.

An additional reason (applicable at least to the 50 superheaters mentioned in section 9 of the amended petition and the 130 superheaters alleged to have been purchased in 1908) for holding that plaintiff can not sustain a claim on account of the use of these superheaters by the Government is found in the fact that the act of 1910 does not authorize a recovery of compensation based on the use by the United States of any article "used by or in the possession of the United States" prior to the enactment of the statute.

As to said 50 superheaters purchased from Whitehead & Company, the plaintiff apparently seeks to recover upon contract. The defendants by their demurrer challenge the sufficiency of the petition in its allegations as to the agreement upon which plaintiff apparently relies, namely, an agreement between plaintiff and the Chief of the Bureau of Ordnance made in June 1907. Construing the pleading more strongly against the pleader, it is manifest that the averments relating to the matter of contract are not as definite as they could be made if, in fact, the suggested agreement was entered into. If Whitehead & Company informed the defendants that it could not sell the superheaters in connection with the Whitehead torpedoes
33 without the express permission of plaintiff because of the license held by plaintiff, and thereupon the defendants' officers applied to the plaintiff for such permission to buy the superheaters from Whitehead & Company, and assuming as valid plaintiff's claim under Appendix "A," and as a condition upon which the purchase would be made, the plaintiff and the defendants' officers agreed that a limited number of Whitehead torpedoes, with the superheater attached, would be purchased from Whitehead & Company, and the Government would pay plaintiff a royalty on the same, the granting of the permission to the Government to make the purchase would

furnish a sufficient consideration to sustain the promise of the Government to pay the stated royalty. Hendrick v. Lindsay, 93 U. S., 143, 148.

If plaintiff had no lawful right to grant a permit to Whitehead & Company to sell the invention to the Government, or if there were any misrepresentation of fact, a different question would arise. While, if inference be allowed, it may be inferred that plaintiff means to allege that permission was granted upon the condition mentioned to purchase superheaters, the allegation as framed is that the Government "might" purchase not more than "100 torpedoes" from Whitehead & Company, the amount of the royalty for the use therein of said superheating inventions to be later settled and agreed upon by the defendant and petitioner, thus failing to specifically aver a permission to buy the superheaters as well as the torpedoes. Of course, it was not necessary for plaintiff to consent to the purchase of Whitehead torpedoes. The concluding averment in paragraph 9 of the amended petition, to the effect that petitioner "has never consented to the use" of said inventions by defendants without the payment of a royalty of $500 each, appears inconsistent with the allegation that an amount was to be later agreed upon.

We express no opinion at this time as to the right of plaintiff to recover compensation if the fact be that plaintiff and defendants' officer agreed that the amount of royalty to be paid plaintiff would be agreed upon later. It is manifest from the allegations that plaintiff did not sell the superheaters and that it authorized the Government to buy and Whitehead & Company to sell them. In acquiring them under such a permit, the Government got no property belonging to plaintiff. It got a permit to purchase property from another. As to whether the plaintiff can have the court fix the compensation under such circumstances, and in view of plaintiff's license agreement, when it was agreed that the compensation (in the shape of royalty) would be later agreed upon by the parties themselves and they have not so agreed, is a question that is left open.

As under a phase of the case mentioned below the plaintiff will be required to make more specific and definite its averment relative to the said purchase, the court withholds any ruling upon the demurrer upon the contract phase of the case referring to the 50 superheaters and will afford the plaintiff an opportunity to amend and state more definitely, as it may be advised, the terms of any contract relied upon and relating to said 50 superheaters.

Another question presents itself, however, and that is one of limitation. The statute of limitations is jurisdictional in this court and need not be specially pleaded. (Wardwell case, 172 U. S.,
34 52.) It is manifest that the allegation that the 50 torpedoes and superheaters were brought into the territory of the United States "subsequent to June 1, 1908," does not fix the date of their purchase under the agreement mentioned. The agreement itself was "on or about June 17, 1907," and in November, 1907, there was correspondence between the parties wherein the bureau desired "to take the subject of royalties under consideration for final settlement."

If this correspondence had no reference to the royalties on the 50 superheaters theretofore authorized to be bought, the petition at least fails to negative such a conclusion. With much particularity the petition sets forth a number of purchases by the Government of Bliss Leavitt torpedoes with superheaters at divers times and payment therefor, the first purchase being under contract of June 4, 1908. But the claim here is for superheaters in Whitehead torpedoes. Construing the pleading more strongly against the pleader, as we might because of its vagueness be justified in doing, the conclusion could be reached that the purchase of the 50 superheaters in question occurred long before June 1, 1908, notwithstanding the indefinite date upon which they were "brought into the territory of the United States." Suit was instituted in this court by the original petition filed May 29, 1914, and therefore only a few days prevents the bar of the statute if it commenced to run on June 1, 1908. It did commence to run when the claim first accrued, and "a claim first accrues, within the meaning of the statute, when a suit may first be brought upon it, and from that day the six years' limitation begins to run." Rice case, 122 U. S., 611, 617.

Section 165 of the Judicial Code provides that where it appears to the court in any case that the facts set forth in the petition do not furnish any ground for relief, it shall not authorize the taking of any testimony therein. In view of this statute, as well as of what has been said about the vagueness of the petition, we think the proper course is to require the plaintiff to make more specific the allegations relative to the alleged agreement and date of purchase of the 50 superheaters instead of construing the averments as we have indicated could be done. This course is justified by the fact that if the claim is really barred the parties should not be subjected to the expense and delay frequently incident to patent litigation.

An order will be entered sustaining defendants' demurrer and motion to strike as to all items of claim for compensation set up in the amended petition except the claim involved in the purchase of 50 Whitehead torpedoes containing superheaters. As to the latter claim, the plaintiff will be required to make its petition more specific.

Hay, Judge; Downey, Judge; Barney, Judge; and Booth, Judge, concur.

35 VIII. *Order of Court Entered December* 3, 1917.

This cause was submitted to the court upon the amended petition and the demurrer thereto by the defendants, and the defendants' motion to strike certain portions of the amended petition, and the same has been duly considered by the court.

It is therefore adjudged and ordered by the court that the defendants' demurrer and motion to strike be sustained so far as concerns the several items of claim designated in the amended petition as 130 torpedoes purchased by the Government on or about July 7, 1908, and 180 torpedoes on or about March 29, 1911, and 50 tor-

pedoes on or about October 25, 1911, all of which are alleged to have some or all of the patented superheater inventions and improvements mentioned in the petition and the 100 superheaters alleged to have been made by defendant since April 15, 1913, making in the aggregate 460 superheaters mentioned in paragraph 10 of the amended petition; that as to all of the said claims for the said 460 superheaters or any of the improvements thereon, no evidence is allowed to be taken in this case.

It is further ordered that as to 50 superheaters alleged to have been purchased from Whitehead & Company in connection with Whitehead torpedoes, and mentioned in paragraph 9 of the amended petition, the claimant is authorized to amend its petition as it may be advised so far as concerns the said 50 torpedoes and superheaters, and the claimant is directed to make more specific and definite its allegations as to the time of the purchase by the Government of the said 50 superheaters.

Said additional allegations and any proposed amendment herein authorized shall be made and filed in this court on or before the 15th day of January, 1918.

All other questions are reserved.

By THE COURT.

36 IX. *History of Further Proceedings.*

On February 18, 1918 the claimant filed a motion to substitute Arthur C. Fraser as attorney of record in place of L. S. Bacon, deceased. On June 3, 1918 this motion was allowed without prejudice to any lien or interest of the former attorney.

On February 18, 1918 the claimant filed a motion for leave to file second amended petition.

On June 3, 1918 the claimant filed a motion for leave to file petition for rehearing.

On June 17, 1918 the court overruled the motion for leave to file second amended petition, and on the same day (June 17, 1918) handed down the following order on the motion for leave to file petition for rehearing:

It appearing that the within motion and argument thereon deal with a proposed amended petition which has not been filed, and no sufficient reason being given for not applying for a rehearing within the time fixed by the rules of the court, the within motion for leave to file a motion for a rehearing is overruled.

June 17, 1918.

By THE COURT.

37 X. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Seventeenth day of June, A. D. 1918, judgment was ordered to be entered as follows:

In this case it is ordered that claimant's motion for leave to file motion for rehearing and claimant's motion for leave to file second amended petition be and the same hereby are overruled. And it is further ordered that plaintiff not having complied with the order of the court of December 3, 1917, to make the petition more specific as to certain items of the claim therein mentioned and referred to in the opinion of the court, the petition be and it hereby is dismissed under Rule 18 of the court.

By THE COURT.

IX. *Claimant's Application for and Allowance of Appeal.*

Now comes E. W. Bliss Company, plaintiff by Arthur C. Fraser, its attorney, and feeling itself aggrieved by the final order of this Court, dismissing plaintiff's petition, entered on the 17th day of June, 1918, hereby makes application for and gives notice of appeal to the Supreme Court of the United States.

Dated New York City, N. Y., September 4, 1918.

E. W. BLISS COMPANY,
Plaintiff-Appellant,
By Its Attorney, ARTHUR C. FRASER.

Filed September 5, 1918.

Ordered: That the above appeal be allowed as prayed for.

EDW. K. CAMPBELL,
Chief Justice.

Oct. 21, 1918.

38 Court of Claims.

No. 32838.

E. W. BLISS COMPANY

vs.

THE UNITED STATES.

I, Sam'l A. Putnam, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the orders and opinion entered by the court; of the judgment of the court; of the application of claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this October 24th, A. D. 1918.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,820. Court of Claims. Term No. 240. E. W. Bliss Company, appellant, vs. The United States. Filed November 18th, 1918. File No. 26,820.